Award No. 3086
Docket No. 2827
2-PRSL-CM-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Thomas A. Burke when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 109, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

PENNSYLVANIA-READING SEASHORE LINES

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling agreement the Carrier is without authority to require employes to undergo periodic physical reexaminations.

2. That, accordingly, the Carrier be ordered to compensate Car Oiler F. A. Goslin in the amount of eight (8) hours at the pro rata rate plus expenses incurred while traveling from his home point, Millville, New Jersey to Camden, New Jersey, and return, in accordance with carrier's instructions.

EMPLOYES' STATEMENT OF FACTS: Franklin A. Goslin, hereinafter referred to as the claimant, is employed by the Pennsylvania-Reading Seashore Line, hereinafter referred to as the carrier, as a car oiler at Millville, New Jersey. The claimant, whose present age is forty-eight (48) years, has been in the service of the carrier since the last date hired, June 23, 1942. The claimant is regularly assigned to the 6:00 A.M. to 2:00 P. M. E. S. T. shift, Tuesday through Saturday, with Sunday and Monday as rest days.

The carrier has ordered the claimant to report to its medical examiner at Camden, New Jersey, at six (6) months intervals, for a physical reexamination. On May 14, 1956, the claimant, in accordance with carrier's instructions, reported to the medical examiner for a physical reexamination. The trip to Camden and return to Millville, together with the time spent in the medical examiner's office, consumed a period of eight (8) hours, for which the carrier refuses to allow the claimant any compensation.

Following the physical reexamination of the claimant he returned to duty on his regular assigned position on Tuesday, May 15, 1956.

This dispute has been handled with the carrier up to and including the highest officer, so designated by the carrier, with the result that he has declined to adjust it. A copy of his letter of declination, dated October 22, 1956, is submitted herewith and identified as Exhibit A.

The regulations effective December 1, 1941, as they have been subsequently amended, are controlling.

POSITION OF EMPLOYES: The employes contend that the carrier violated Regulation No. 1-A-1 of the current agreement, reading:

> "**applicants for employment** will be required to answer questions necessary to determine whether or not they are qualified to become satisfactory employes and **will undergo a physical examination** to determine their fitness for the work required and to protect the health and safety of employes." (Emphasis ours)

by ordering the claimant to submit to periodic physical reexaminations. The employes submit that the above quoted regulation is applicable only to "applicants for employment".

The employes further contend there is nothing in Regulation No. 1-A-1 that requires an employe, in the service of the carrier, to submit to a periodic physical reexamination and neither is there any other regulation in the controlling agreement which provides for such periodic physical re-examination. On the basis of the foregoing indisputable facts of record it is the employes' position that the carrier is without authority under the provisions of the controlling agreement to require employes, in the service of the carrier, to submit to physical reexaminations.

The claimant having been ordered to report to the carrier's medical examiner, Camden, New Jersey, for a periodic physical reexamination, Monday, May 14, 1956, justly claims eight (8) hours pay, plus expenses, for the time consumed and on the basis of the facts and controlling rules of the agreement together with the employes' position, your Honorable Board is justified in sustaining the claim of the employes in its entirety.

CARRIER'S STATEMENT OF FACTS: A communication dated July 22, 1957, from the executive secretary of the National Railroad Adjustment Board, Second Division, to the general manager, Pennsylvania-Reading Seashore Lines, contains the information of "written notice" received from Mr. Michael Fox, President, Railway Employes' Department, A. F. L.—C. I. O., of his intention to file an ex parte submission in the claim outlined in his letter.

A copy of Mr. Fox's letter indicates that F. A. Goslin claims an unadjusted dispute is pending between him and the Pennsylvania-Reading Seashore Lines, referred to therein in the form quoted at the beginning of this submission.

At the time this dispute arose, F. A. Goslin (hereinafter referred to as the claimant) was regularly assigned as a car oiler at Millville, N. J., with tour of duty 7:00 A. M. to 3:00 P. M., off-duty days Sunday and Monday.

It has been the policy and practice of the company to give periodic physical examinations to all employes after they have reached their 40th birthday with the exception of trackmen and coach cleaners.

Periodic examinations of the claimant were held on November 16, 1953 and October 4, 1954. At the latter examination the medical examiner had in his possession a report which indicated that the claimant had been slow in getting around on his car oiler job. The claimant's assignment as a car oiler requires him to do a considerable amount of walking while engaged in the work of servicing journal boxes on the carrier's rolling stock. At that examination it was learned that claimant had been afflicted with chronic arthritis of the ankles and fallen arches for a number of years, and that such condition existed at the time of the examination. In view of the amount of walking the claimant was required to do and the adverse affect such walking could possibly have upon the condition of his ankles and feet, it was deemed necessary by the carrier's medical department that claimant be afforded a special periodic examination every few months in order to ascertain whether or not claimant's continuance on the car oiler assignment was in the best interest of his personal safety and welfare.

The claimant was again examined on January 3, 1955, April 11, 1955, August 1, 1955, November 14, 1955, May 14, 1956, December 17, 1956 and July 22, 1957. All of the above examinations were held on one of the claimant's rest days. After each one of the above examinations the medical officer conducting such examinations found that claimant's physical condition was such that he could continue to perform the duties of car oiler.

The claimant presented a claim for eight (8) hours' pay for May 14, 1956, because he was required to submit to a physical examination on one of his off-duty days. The foreman, car inspectors denied the claim under date of July 9, 1956.

In a letter dated August 10, 1956, the local chairman, Brotherhood Railway Carmen of America, presented the claim to the carrier's master mechanic, who denied the claim by a letter dated August 15, 1956.

Thereafter, the general chairman, Brotherhood Railway Carmen of America, presented the claim to the carrier's general manager in a letter dated August 29, 1956. The general chairman contended, in effect, that the carrier was not authorized under the applicable agreement to require the claimant to submit to a medical examination at periodic intervals; further, that since claimant had complied with the carrier's instructions on May 14, 1956, he was entitled to eight (8) hours' pay therefor.

Following a meeting held on August 29, 1956, the general manager denied the claim by a letter dated October 22, 1956.

A copy of the general manager's letter of October 22, 1956, is submitted herewith and identified as Exhibit A.

Therefore, so far as the carrier is able to anticipate the basis of the claim, the questions to be decided by your Honorable Board are whether the carrier properly may require the claimant to undergo periodic physical examinations, and whether the claimant is entitled to the compensation which he claims as the result of the physical examination accorded him on May 14, 1956, one of his off-duty days.

POSITION OF CARRIER: A. The Pennsylvania-Reading Seashore Lines objects to the jurisdiction of the National Railroad Adjustment Board, Second Division, for the reason that the said company has not received due and proper notice of the claim made against it in the above entitled matter.

B. The Pennsylvania-Reading Seashore Lines, in order to avoid an award against it by default, does hereby submit this answer to what it supposes by way of anticipation such claim to be, reserving all objections that it has or may have to the validity of any acts or proceedings of the National Railroad Adjustment Board, Second Division, in the said matter.

The carrier will show that:

I. There is an agreement between the carrier and its employes of the craft and class of which the claimant is a member, governing the rules, rates of pay and working conditions of the claimant, which is applicable to the present claim;

II. The carrier's action in requiring the claimant to submit to a special periodic physical examination on May 14, 1956 was entirely proper, was not in violation of the agreement, and the claimant is not entitled to the compensation which he claims;

III. Under the Railway Labor Act, the National Railroad Adjustment Board, Second Division, is required to give effect to the said agreement and to decide the present dispute in accordance therewith.

Each of the points of the carrier's position will be discussed in the order set forth above.

I. There Is An Agreement Between The Carrier And Its Employes Of The Craft And Class Of Which The Claimant Is A Member, Governing The Rules, Rates of Pay And Working Conditions Of The Claimant, Which Is Applicable To The Present Claim.

The Pennsylvania-Reading Seashore Lines entered into an agreement with its employes of the Maintenance of Equipment Department through their duly designated and authorized representative, the Brotherhood of Railroad Shop Crafts of America, which covers the rules, rates of pay and working conditions of the said classes of employes. This agreement is known as the "Schedule of Regulations and Rates Of Pay And Graded Work Classification For The Government of Mechanics, Helpers And Apprentices In The Sheet Metal Workers And Carmen's Crafts In the Maintenance of Equipment Department Employes Of The Pennsylvania-Reading Seashore Lines" Regulations effective December 1, 1941, Rates effective December 1, 1941.

The agreement of December 1, 1941, was amended July 1, 1945, and September 1, 1949.

Effective September 22, 1949, the Railway Employes Department, A. F. of L. became the designated representative of the crafts and classes of employes referred to in the agreement mentioned above.

The claimant is an employe member of the carman craft or class and his rate of pay and working conditions are governed by the aforesaid agreement. Consequently, in order to sustain the claim in this dispute, the claimant must show that the agreement, on its face or as interpreted by the parties thereto, has been violated and that he is entitled to the compensation which he claims.

II. The Carrier's Action in Requiring The Claimant To Submit To A Special Periodic Physical Examaination On May 14, 1956. Was Entirely Proper. Was Not In Violation Of The Agreement. And The Claimant Is Not Entitled To The Compensation Which He Claims.

As set forth in the statement of facts above, the claimant after reaching his 40th birthday was given periodic physical examinations in conformity with the company's policy and practice. At the examination held on October 4, 1954 the medical examiner had in his possession a report which indicated that the claimant was slow in getting around on his car oiler assignment and the examination disclosed that the claimant had been suffering for a number of years from chronic arthritis of the ankles and fallen arches. At that time it was deemed necessary by the carrier's medical department that the claimant submit to special periodic physical examinations every few months in order to ascertain whether or not his continuance on the assignment of car oiler was in the best interest of his personal safety and welfare. Thus, on January 3, 1955, April 11, 1955, August 1, 1955, November 14, 1955, May 14, 1956, December 17, 1956 and July 22, 1957, the claimant was afforded physical examinations. The physical examination given on May 14, 1956 eventuated in the claim here before your Honorable Board.

The claim of the employes in this case is in two parts. In paragraph 1 the employes allege that under the controlling agreement the carrier is without authority to require employes to undergo periodic physical re-examinations, and in paragraph 2 the employes ask that the claimant be compensated in the amount of eight (8) hours at the pro rata rate plus expenses incurred while traveling from his home point, Millville, N. J., to Camden, N. J., and return. Both of these issues will be discussed by the carrier hereinafter.

As to the first issue, it was the contention of the employes during the handling of the claim on the property that the requirement of a medical examination at periodic intervals was in violation of Regulation 1-A-1[1] of the agreement which requires only that applicants for employment submit to a medical examination.

The carrier asserts that Regulation 1-A-1 was not intended by the parties thereto to prohibit or bar the administering of periodic physical re-examinations after an applicant for employment has undergone his original physical examination incident to his entry into the service of the company.

Regulation 1-A-1 by its very nature was not intended to be a restrictive rule upon the carrier but rather was adopted by the parties in order to afford the carrier and its employes adequate safeguards against the possibility of an applicant acquiring employment without the benefit of a physical examination and who might subsequently be found to have certain mental or physical defects which (1) would not enable him to perform the work required, or

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[1] Regulation 1-A-1 of the agreement reads as follows:

"**1-A-1. Applicants for employment** will be required to answer questions necessary to determine whether or not they are qualified to become satisfactory employes and will undergo a physical examination to determine their fitness for the work required and to protect the health and safety of employes."

(2) would be detrimental to the health and safety of the carrier's employes. Most certainly, if the parties had intended Regulation 1-A-1 to prohibit subsequent physical re-examinations by the carrier, adequate language to that effect obviously would have been adopted by the parties to serve that purpose. In the absence of any provision in Regulation 1-A-1 prohibiting the administering of periodic physical re-examinations by the carrier, it follows that the said rule cannot properly be held to have been violated in the instant case.

The carrier desires to emphasize here that the very nature of railroad business places upon the carrier a responsibility to consider the safety of its employes and the safe operation of its system. The carrier's liability in that respect makes it responsible for the fitness of its employes to hold their respective positions and to perform the duties of their positions in a safe and efficient manner. A physical examination accorded an applicant for employment, in which it is found that he possesses the necessary fitness to enter the service, unfortunately is no guarantee that he may not at some later time be afflicted with an ailment or disease which would render him incapable of performing the work required, or would be detrimental to the health and safety of himself and his fellow employes. The carrier is therefore, entitled to be abundantly precautious, not only in the selection of its employes, but also in determining the continuing ability and physical fitness of employes in service.

The National Railroad Adjustment Board has held in numerous awards that a carrier properly may require its employes to submit to periodic physical examinations when such are deemed to be necessary in order to protect the health and safety of such employes. The following awards are representative of this holding:

First Division Award 13859 (Referee Donaldson)

"We find that the institution of a regular, periodic, physical examination program to assure the continued good health of its employes in the interest of the protection of the public and the equipment handled is a managerial function and that the same may be unilaterally imposed."

First Division Award 15591 (Referee Tipton)

"We think management has the right to require their employes to submit to periodic physical examinations. The law requires a carrier to exercise the highest degree of care in the operation of its trains. How can management fulfill this duty unless they take appropriate measures to ascertain that their employes are physically fit to perform their duties?"

Second Division Award 547 (Referee Helander)

"The question here is over the claimed right of the Carrier to require physical examinations after employment.

"There is no provision in this agreeemnt providing for re-examination of these employes. Moreover, there is nothing in the record or in the history of the controversy between the employes and the carrier on this question that would indicate that the employes were ever willing that such a practice be adopted.

"Though it has been held in general that physical examinations may not be required of these employes, there must be some limit to the contention that the carrier cannot require such examinations under any circumstances. It would not be reasonable to contend that there are no circumstances in which it may not be required.

"A change in the employe's condition of such a nature as to be obvious and likely to subject not only such employe but fellow employes to much hazard, would give the carrier the right to investigate to determine if his condition is such as actually to be hazardous . . ."

Second Division Award 998 (Referee Sharfman)

"* * * it is the opinion of the Division that the carrier did not act arbitrarily or unjustly in requiring the claimant to submit to a physical re-examination by the company physician. If, after such re-examination, the report of the company physician had conflicted with that of the claimant's personal physician, there conceivably might have been a basis, in the interest of according the claimant just treatment, for ordering that the conflict be dissolved through an independent report by a neutral physician. But the mere requirement of a physical re-examination by the company physician did not, in the light of the facts of record in this proceeding, constitute unjust treatment or a violation of the agreement."

Third Division Award 6942 (Referee Messmore)

". . . This Board does not dispute the Carrier's right to require an employe to submit to physical examination in its own interest or in the interest of its employes. Awards of this Division have held that this does not give the Carrier the exclusive right to make the determination as to the fitness to perform services solely upon the advice of its own physician or physicians. See Awards 4649, 362, 728, 875, 2886, 3212 and 6317.

"We have held consistently that where safety of the employe at work was involved or the safety of the public, the company is entitled to take precautionary measures, including physical examinations, as indicated in the above awards."

It is clearly evident from the foregoing awards that the carrier was perfectly justified in requiring the claimant to submit to not only the periodic physical examinations given to all employes with the exception of trackmen and coach cleaners who have reached their 40th birthday, but also to require the claimant to submit to the special periodic examinations and in particular the examination of May 14, 1956, in view of his physical condition, which was found to exist at the periodic examination held on October 4, 1954. Such action was not in violation of Regulation 1-A-1 or any other regulation of the applicable agreement, and it follows that there is absolutely no merit to paragraph one of the employes' claim, in which it is alleged that "under the controlling agreement the Carrier is without authority to require periodic physical examinations".

As has been stated before, it is the company's policy and practice to give periodic physical examination to employes who have attained their 40th

birthday with certain exceptions. This policy of periodic examinations is to the benefit of the employes as well as to the company. The claimant, as all other employes in his craft or class, was periodically examined, and when one of the examinations disclosed a detrimental physical condition the claimant was given further examinations at two or three month intervals. This again was in conformity with the company's policy and practice and inured to the benefit of the employe as well as to management. The fact that this was the company's policy and practice combined with the fact that the agreement in no way prohibits the carrier from requiring employes to submit to physical examinations again illustrates the lack of merit in paragraph one of the employes' claim. It is also of interest to note that the claim is but for one of these examinations out of least nine that the claimant was afforded.

Turning now to paragraph 2 of the employes' claim, it will be noted request is made that the claimant be compensated in the amount of eight (8) hours at the pro rata rate plus expenses incurred while traveling from Millville, N. J., to Camden, N. J., and return.

Dealing first with claimant's request for eight hours' pay at the pro rata rate for May 14, 1956, the carrier desires to call attention to the fact that throughout the entire handling of the present claim the employes did not cite a single rule of the agreement providing for the compensation claimed. This is readily understandable since the agreement is completely silent with respect to any question of compensating employes when required to submit to physical examinations by the carrier's medical officers.

The carrier desires to emphasize here that the applicable agreement contemplates that employes covered thereby are **only** entitled to compensation when and if actual "work" or "service" is performed, and for certain other reasons, which are not applicable here, such as attending court as witnesses or appearing as witnesses in discipline and appeal cases.

The National Railroad Adjustment Board has held on numerous occasions that the rules of an agreement relating to "work" and "service" do not comprehend time spent for physical examinations, meetings, etc.

For example, in Second Division Award 1162 (Referee Thaxter) it was said:

> "The claimants were required to report for eyesight and hearing tests outside of their regular hours. They seek compensation under Rule 5 for time so spent. But the taking of such examination **is not 'service** as the word is used in that rule' **Nor is it work** as the word is used in Rule 110. **There is no rule providing for compensation for time so spent and this Division is without power to write one."** (Emphasis supplied)

Note also the following appearing in Award 2508 of the Third Division (Referee Thaxter):

> ". . . The majority of awards hold that **the rules of an agreement relating to work do not cover the performance of such special services as time spent for examinations,** attending court or investigations; and meetings and conferences would be in the same class. Awards 134, 409, 487, 605, 773, 1032, 1816, 2131." (Emphasis supplied)

And in the Third Division Award 3302 (Referee Simmons) it was said:

> "To bring this claim within these rules we must hold that reporting and undergoing a physical examination is 'work'. This Division as early as Award 134 held that the term 'work' as used in collective agreements in the railroad industry, has usually been construed to mean work of the type to which an employe is regularly assigned. Clearly under that definition, taking a physical examination is not work within the cited rules."

The carrier submits that the awards cited above clearly establish the complete invalidity of the employes' claim that claimant is entitled to eight (8) hours' pay as a result of being required to undergo a physical re-examination on May 14, 1956.

It is the carrier's position that nothing in the negotiated agreement requires the carrier to compensate the claimant for undergoing a physical re-examination on one of his off-duty days. That being so, it follows that the request for eight (8) hours' compensation here before your Honorable Board unquestionably is one for negotiation between the parties and is not a matter over which your Honorable Board has jurisdiction. This principle has been enunciated by your Honorable Board on numerous occasions. In this connection attention is again called to Second Division Award 1162, previously referred to in this submission, wherein it was stated that, "There is no rule providing for compensation for time so spent and this Division is without power to write one."

The carrier submits that in the absence of any rule or rules in the applicable agreement covering the matter here in dispute, your Honorable Board may not properly issue an award in this case which would have the effect of imposing upon the carrier an obligation, which does not now exist, to compensate the claimant in the amount of eight (8) hours at the pro rata rate on account of undergoing a physical re-examination at Camden, N. J., on one of his off-duty days.

Paragraph 2 of the employes' claim also contains a request that the claimant be compensated for "expenses incurred while traveling from his home point, Millville, New Jersey to Camden, New Jersey, and return."

The carrier desires to call attention to the fact that the claim now being made in behalf of the claimant for expenses allegedly incurred while traveling from Millville to Camden and return was not presented to the carrier nor discussed at any time during the handling of this dispute on the property and is thus a new issue which has been presented to your Honorable Board for the first time.

It is the carrier's position that the issues in dispute between the parties many not be one thing on the property and then something entirely different before your Honorable Board. Nothing in the applicable agreement permits the changing, expanding, modifying, or altering of the issues in dispute as is now being attempted by the employes, nor is such action permissible under Section 3, First, subsection (i) of the Railway Labor Act. Of interest in this respect is the following appearing in Award 1314 of the Third Division (Referee Wolfe):

> "The claim as first presented was changed during the course upward from the Superintendent to the Assistant Vice President

and as presented to the Board contains additional items. This certainly was not in accord with Section 3, First (i) of the Railway Labor Act, and if the claim had been presented ex parte would have to be remanded to be processed through channels . . ."

Note also the following appearing in Third Division Award 5469 (Referee Carter):

"Carrier asserts that Claimant's work was not kept up without expense to the Railway Company in accordance with the provisions of Rule 67. This question was not raised on the property, and cannot be raised before this Board for the first time. Parties to disputes before this Board will not be permitted to mend their holds after they reach the Board on appeal, and thereby create variances in the issues from what they were on the property."

The carrier respectfully submits, therefore, that your Honorable Board may not properly proceed to handle the claim made in behalf of the claimant for expenses allegedly incurred on May 14, 1956, since that portion of the claim was not raised by the employes on the property.

Furthermore, the claim now being made for the first time in behalf of the claimant for expenses allegedly incurred on May 14, 1956, in any event is invalid under the provisions of Article V of the agreement of August 21, 1954 between Railroads represented by the Eastern, Western and Southeastern Carriers' Conference Committees And the employes of such railroads represented by the Employes' National Conference Committee, Fifteen Cooperating Railway Labor Organizations. Article V of this agreement reads, in part, as follows:

"1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same; within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallownce, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a

decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

* * * * *."

It will be noted that under paragraph 1(a) of Article V, all claims or grievances **must** be presented in writing to the officer of the carrier authorized to receive same, within **60 days** from the date of the occurrence on which the claim or grievance is based. The claim made in behalf of the claimant for expenses allegedly incurred on May 14, 1956, has not been handled by the employes in accordance with Article V of the August 21, 1954 agreement. Therefore, it may not now properly be entertained nor allowed.

III. **Under The Railway Labor Act, The National Railroad Adjustment Board, Second Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Second Division, is required by the Railway Labor Act to give effect to the said agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties. To grant the claim of the employes in this case would require the Board to disregard the agreement between the parties thereto and impose upon the carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The carrier has shown that the applicable agreement has not been violated in the instant case and that the claimant is not entitled to the compensation which he claims.

It is respectfully submitted, therefore, that the claim in the instant case should be denied.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant, on the orders of the carrier, submitted to a physical examination on his rest day.

He asks compensation for time lost.

Was the agreement violated?

There is no rule in the effective agreement concerning physical examinations of employes.

Regulation 1-A-1 does not apply. It applies to applicants for employment.

The right of the carrier to require physical examinations of employes is established by past practice. This was so in 1941 when the current agreement became effective.

Is the claimant entitled to compensation for time lost? No work or service was performed and there is no rule in the effective agreement requiring the carrier to pay its employes for taking a physical examination. See Award No. 2708 of this Division.

Our only function is to determine if the agreement has been violated.

If this practice of requiring physical examinations is unfair or inequitable it should be corrected by negotiation.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 19th day of January, 1959.

DISSENT OF LABOR MEMBERS TO AWARD No. 3086

Examination of the findings discloses that the majority ignored the primary issue entirely; the primary issue being whether under the controlling agreement the carrier has the authority to require employes to undergo **periodic physical reexaminations.**

Naturally there is "no rule in the effective agreement requiring the carrier to pay its employes for taking a physical examination." How could there be since there is no rule in the agreement requiring an employe to take a physical reexamination? It is however an elementary principle of the law of contract, where parties are situated as are these, i. e., employer and employe, that if the employer calls upon the employe to do something the employer thereby creates an implied contract to the effect that if the employe responds he will be paid.

The majority, in stating that the matter of physical examinations should be corrected by negotiation, overlook the fact that physical examinations were the subject of discussion at the time the agreement was negotiated and physical reexamination was not included in the agreement. The agreement was adopted through the medium of fair and open negotiation and decisions of

the Board should be made in the light of the existing agreement in order to avoid any negation of Sec. 2 First of the Railway Labor Act.

The majority makes no distinction between physical examination for employment and physical examination of employes. To hold, as do the instant findings, that the right of the carrier to require physical reexamination of employes is established by past practice is tantamount to creating a new rule providing for physical reexamination of employes. This the Board is without jurisdiction to do since it has no authority to make or amend a rule of an agreement. The Board is bound by the agreement which the parties have made.

James B. Zink

R. W. Blake

Charles E. Goodlin

T. E. Losey

Edward W. Wiesner